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No. 361.

In the Supreme Court of the United States

October Term, 1934.

E. W. CLARK, Commissioner of Insurance of the State of Iowa, as Receiver of FEDERAL SURETY COMPANY, *Petitioner,*

vs.

HARRY O. WILLIARD, W. W. WHEATON, and C. W. HAY, as Trustees of GORDON CAMPBELL-KEVIN SYNDICATE, a common-law trust, and GORDON CAMPBELL-KEVIN SYNDICATE, a common-law trust, *Respondents.*

BRIEF FOR R. EMMET O'MALLEY, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF MISSOURI, WHO AS A FRIEND OF THE COURT SUBMITS THIS BRIEF.

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vs.

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BRIEF FOR R. EMMET O'MALLEY, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF MISSOURI, WHO AS A FRIEND OF THE COURT SUBMITS THIS BRIEF.

No. 361.

STATEMENT.

The Superintendent of the Insurance Department of the State of Missouri appears in this matter as a friend of the Court and does so on behalf of the sovereign State of Missouri. The State of Missouri, particularly in the discharge of its functions in the supervision of its insurance corporations, will be vitally and directly affected by

the decision in this cause. The State of Missouri has delegated to its Insurance Department, and particularly to the Superintendent of that Department, the responsibility of supervising the conduct of business by Missouri insurance corporations and the rehabilitation and winding up of the affairs of any such company that may become impaired or placed in liquidation. The status of the Department and its Superintendent with respect to liquidation of Missouri insurance corporations has previously been before this Court. See *Relf* v. *Rundle*, 103 U. S. 222, 26 L. Ed. 337.

The Missouri Department is now engaged in the rehabilitation of the affairs of several Missouri insurance corporations. The following instances will indicate the direct interest which the State of Missouri and its Superintendent of Insurance have in the subject matter of this controversy:

> In August, 1933, the Superintendent of Insurance for the State of Missouri became the liquidating officer of Missouri State Life Insurance Company, a Missouri corporation. Thereafter the Courts in Oklahoma, Georgia, Indiana and Florida appointed a receiver for said corporation and its assets in their respective jurisdictions. From the ruling of the trial court in the States of Oklahoma and Indiana, appeals have been taken and are now pending before the Supreme Courts of said States.
>
> In the States of Georgia and Florida the trial courts are now considering the status of the receivers there appointed.
>
> In May, 1934, the Superintendent of Insurance of the State of Missouri, was vested with title to all the assets of the Continental Life Insurance Company, a Missouri corporation, for the purpose of rehabilitating the affairs of that Company. Subsequent thereto the courts in the States of Oklahoma and California

appointed receivers for said corporation. The question of the status of such receivers is now pending before the courts making such appointments.

Both of the foregoing Missouri corporations transacted business in more than thirty-two States of the United States, and had assets situate in most of said States.

In spite of the decisions which have been handed down and which touch upon the effect to be given to statutory charter provisions, there still remains either a great deal of uncertainty or a wilful determination to avoid the principles enunciated. The liquidation of insurance companies presents a most difficult problem because they cannot be brought within the protection of the Bankruptcy Act. To provide a uniform liquidation of the affairs of such companies and an equitable distribution of its assets among those entitled thereto, the statutory law of the State creating such corporation, providing the only method by which such companies can be liquidated or rehabilitated must be given effect. Many of the companies transacted business on a vast interstate scale. In the liquidation and rehabilitation of their affairs there is encountered an intense desire upon the part of certain individual creditors in foreign States to derive some special benefit out of the local assets which will put them in a better position than creditors generally. The true principles involved do not receive the same impartial consideration as principles governing other and more usual local situations. As a result, under existing conditions the statutory liquidation or rehabilitation officer of an insurance company is constantly thwarted in the administration of his trust by being confronted with the alternative of conceding unreasonable demands, or of encountering serious waste of assets by way of compromise or expensive litigation.

In the interest of the discharge of the sovereign responsibilities of the State of Missouri and for the purpose of aiding in defining the issues this brief is presented.

Contentions of the Parties.

The parties are not in accord on the nature of the question to be decided. Petitioner demonstrates that the Iowa statutes and the former decisions of the Court result as follows:

> 1. He is the statutory successor of the dissolved Iowa insurance corporation.
>
> 2. The Iowa statutory charter provisions require ratable distribution of assets of a dissolved Iowa insurance company among all its creditors.
>
> 3. The full faith and credit clause requires recognition of those established truths.

Petitioner in effect says that there is only one issue remaining, viz.:

> What is required of a State in order that it evidence the recognition to which the full faith and credit clause and former mandate of this Court entitle the Iowa statutory charter provisions, including Petitioner's status?

Stated in another way, petitioner stands before this Court and in effect says: My status is defined as the person designated by the laws of Iowa, to take the property of a dissolved insurance company of that State, and ratably distribute same among all creditors and other interested persons. This Court has said that my status and incidentally the status of all the creditors, must be

recognized in Montana. Montana has not complied with that requirement.

Respondents, on the other hand, state that petitioner's status, though required to be recognized under the Constitution in Montana, is not binding on Montana courts, and gives to petitioner no greater rights with respect to property situate in Montana than his predecessor had. Their brief in this respect fails to recognize that petitioner's status has been fixed by this Court, and that this Court has said that the Federal Constitution requires recognition of the statutory charter provisions creating petitioner's status. The resistance thus directed is to questions already decided by this Court.

For example, respondents' brief deals at length with decisions such as *Security Trust Co.* v. *Dodd*, 173 U. S. 624; *Fall* v. *Eastin*, 215 U. S. 1; *Hale* v. *Allison*, 188 U. S. 56. That brief draws from those decisions the conclusion that Montana is free to deal with the statutory charter provisions as Montana sees fit. That argument would only apply if the statutory charter provisions creating petitioner's status were not entitled to full faith and credit. The mandate of the Constitution and the mandate of this Court compel recognition thereof.

Issue.

This litigation has narrowed to a point where this Court has the opportunity to set at rest a great deal of misapprehension and enunciate a policy vital to an orderly liquidation of dissolved insurance companies. The issue for decision is:

> **Is the constitutional requirement of full faith and credit met by an allegation of compliance (in a judicial opinion), or is compliance to be judged by the result arrived at?**

POINTS FOR ARGUMENT.

I. Authorities are inapplicable insofar as they discuss and decide the question whether a foreign statute or decree is entitled to full faith and credit. In this case it has been decided that the statutory charter provisions are entitled to full faith and credit.

II. The only task remaining is to define compliance with the full faith and credit requirement. What must be done to grant full faith and credit?

III. The conflict of sovereign powers is not involved.

IV. A separate consideration of points in the respondents' opposition brief.

I.

Authorities are inapplicable insofar as they discuss and decide the question whether a foreign statute or decree is entitled to full faith and credit. In this case it has been decided that the statutory charter provisions are entitled to full faith and credit.

The brief of respondents, filed in opposition to the petition for writ of certiorari in this case, seeks to retry the question whether the Iowa statutory charter provisions creating petitioner's status are entitled to full faith and credit. The decisions relied on, such as the *Security Trust Case, Fall* v. *Eastin,* and *Hale* v. *Allison* (all cited above), only hold that the particular act or decree there considered was not entitled to recognition or full faith and credit. They are inapplicable here because this Court has already held that statutory charter provisions and the status resulting therefrom are entitled to full faith and credit. This Court as a matter of authority so decided in *Relf* v. *Rundle,* and in the Converse cases.

In this particular litigation that determination has become the law of the case.

This case involves statutory charter provisions and a status which are entitled to full faith and credit. So much has been settled; and to bring in cases which deal with a judgment, with a statute, or with a status which has been held otherwise, merely complicates the situation.

II.

The only task remaining is to define compliance with the full faith and credit requirement. What must be done to grant full faith and credit?

In Montana petitioner or any other statutory successor must be recognized and treated as such. He is undeniably there. The full faith and credit clause has figuratively taken him there. What may the foreign State do with him and the status that he is endeavoring to carry out? A decision such as the last Montana decision now under consideration in effect says:

> "We recognize you as a statutory successor. We acknowledge your presence in Montana. Having said as much, we have complied with the full faith and credit clause. Therefore, we are freed from further constitutional restriction and will treat you as we wish."

If the constitutional requirements are satisfied by such sophistry, then the Constitution will surely collapse of its own weight.

There remains the unalterable fact that a statutory successor such as petitioner, when he goes into a foreign State, is in that State a statutory successor with the powers and prerogatives of a trustee of an express trust.

This results unerringly from the full faith and credit clause. If that State fails to accord him that status it has denied full faith and credit to the statutory charter provisions of a sister State governing the liquidation of one of its dissolved corporations; and its denial is in no way mitigated by its bland statement in judicial opinion that it has accorded petitioner's status with full faith and credit, when the obvious effect of such opinion is to the contrary.

III.

The conflict of sovereign powers is not involved.

The alleged conflict between sovereign powers has been removed from this case by the decisions of this Court, which have placed statutory succession statutes within the category entitled to full faith and credit.

Though the question of sovereignty were at stake, no violence would be done on the theory adhered to by the respondents, which is, that the Montana law must be looked to for the purpose of determining the rights of a receiver or statutory successor in Montana.

We concede that if receivers were unknown to the Montana law, and if Montana would not protect its own receivers, that under those circumstances Montana would not be required to protect the statutory successor of a foreign corporation against execution levies. Petitioner only complains that Montana will protect its own receivers and refuses to protect him against execution levies.

Such a position concentrates too strongly on the individual. The problem arises because the statutory charter provision calls for ratable distribution. The petitioner's title and his status are incidents only. When a statutory charter provision calls for ratable distribution of the

assets of a dissolved insurance corporation, that statute is denied full faith and credit by any foreign State which so acts as to prevent ratable distribution. Up to the point of averting ratable distribution all other States may exercise all the latitude they would exercise in any other case.

The judgment of the Supreme Court of Montana in this case determines that it will protect the title to property of a Montana liquidator or receiver against the levy of execution after the time of his appointment, but at the same time denies such protection to petitioner. Full faith and credit is not given to the status of petitioner by the determination of the Supreme Court of Montana that petitioner can only make ratable distribution after the date of Critchton's appointment as ancillary receiver in Montana. Full faith and credit must be given to the statutory charter provisions requiring ratable distribution to be made of the property of a dissolved insurance corporation, the same as full faith and credit must be given to the title of petitioner to such property.

Any conclusion other than the foregoing will set a precedent which will inevitably permit all the States to comply with the constitutional requirements by rendering no more than "lip service."

IV.

A separate consideration of points in the respondents' opposition brief.

Up to this point this brief has dealt with the brief of respondents filed in opposition to the petition for certiorari only in its broader aspects. The purpose at this point is to deal more specifically with some of the contentions therein set forth.

(A.)

Respondents first contend that the first decision in this case by this Court permitted the courts of Montana after remand to decide this case as they see fit. Respondents say that otherwise this Court engaged in a useless gesture when it remanded the case. This contention is the equivalent of saying that the State of Montana is not bound by the Constitution. When it handed down the first decision in this case, this Court had before it only the question whether petitioner derived title to property in Montana as statutory successor and charter liquidator, or as a receiver through judicial proceedings. This Court could not at that time determine the public policy of Montana as to statutory successors, and necessarily remanded the case in order that Montana might announce its policy. True enough, there was the possibility that Montana might announce an unconstitutional policy. This Court justifiably refrained from assuming that Montana would do so. But certainly this Court by remanding the case did not leave Montana free to announce unconstitutional policies.

(B.)

At pages 8 and 9 of their brief the respondents endeavor to demonstrate that petitioner in Montana was protected against execution levies as fully as a Montana liquidator would have been. In the first place, the text of the brief on pages 8 and 9 utterly fails to substantiate that contention. In any event, however, the text fails to answer the proposition that Section 9303 of the Civil Code of Montana provides for receivers of dissolved corporations and that the very judgment appealed from in this case protects a receiver so appointed in Montana. To

say, under those circumstances, that a foreign liquidating officer was protected as fully as a Montana liquidator is to deny the obvious.

(C.)

At pages 10 and 11 respondents endeavor to demonstrate that there was no discrimination, first, because levies of execution were open to all persons, and second, because there is no such thing known to Montana law as a liquidator, except the last Board of Directors. This latter contention again overlooks Section 9303 of the Civil Code of Montana, which expressly provides for a receiver in certain cases. We contend only for the proposition that a foreign liquidating officer is endowed with the powers and prerogatives of a receiver liquidating a dissolved corporation in Montana. The Montana law clearly provides for a receiver to liquidate the affairs of a dissolved corporation. The Montana court in this very case has upheld the appointment of a receiver and has protected that appointment against execution levies.

(D.)

On pages 12 and 14 of their brief respondents endeavor to demonstrate that the Iowa law permits levies of execution against Iowa liquidators and that therefore Montana may permit such levies. In the first place, we find no evidence in the record that the Iowa law does permit such levies. Respondents apparently go outside the record and rely upon the cases of *Schloss* v. *Metropolitan Surety Co.*, 149 Iowa 382, and *Watts* v. *Southern Surety Co.*, 248 N. W. 347. Those cases do not deal with the policy of Iowa as to receivers appointed in Iowa. The Schloss case dealt with a levy of attachment against

property claimed by a non-resident receiver whose status was apparently never clearly placed before the Court. The Watts case dealt with an ancillary receiver of a foreign corporation appointed after a levy of attachment. The levy of attachment which was made before the appointment of the ancillary receiver was upheld. Neither of these cases, in our opinion, demonstrates that the courts of Iowa would permit levy of execution against a receiver appointed to liquidate the affairs of a dissolved corporation in Iowa. Notwithstanding the decisions in the Schloss and Watts cases, *supra*, the public policy of Iowa has been declared by statute, and requires a ratable distribution of the assets of a dissolved insurance corporation among its creditors. It is no defense to say that because Iowa courts might act unconstitutionally, Montana courts may do so.

(E.)

On page 16 of their brief, respondents assert that petitioner has no greater charter powers than the corporation had; that the charter permitted levies of execution against the corporation; and that therefore the charter permits levies against the statutory successor. The fallacy lies in the assumption that the statutory liquidating officer must submit to the same treatment as the corporation that he has succeeded, when being operated as a going concern. The purpose of the liquidating act of Iowa is to procure ratable distribution. The property in the hands of the statutory successor is in quite a different status than the same property in the hands of the corporation.

Conclusion.

The situation presented by this litigation is acute. State officials endeavoring to work out ratable distribution to creditors of their respective insolvent insurance companies have been faced with tremendous difficulties, not alone because of unwarranted preferences acquired by creditors in other States, but because of the great expense and loss resulting from the very uncertainty which has brought about the situation now before the Court. Even though the domiciliary liquidator ultimately prevails in the courts of a state, in the end there is a drastic loss to creditors generally because the liquidator has been forced into litigation and into compromises which result in a diversion of assets. Liquidation expense out of all proportion to accepted standards is necessarily incurred.

The very fact that doubt exists as to the rights of the domiciliary liquidator and as to the effect of the statutory charter provisions in foreign jurisdictions is the cause of great loss and waste. Whatever can be done to clarify the situation beyond equivocation will enure vastly to the benefit of the great mass of citizens who are willing to stand by and to take ratable shares in the distribution of assets.

The foregoing derives its greatest strength from the proposition that this Court has already held that the statutory charter provisions are entitled to full faith and credit. To define the requirements of full faith and credit as here contended for will be merely an extension

of principles already well settled, will do violence to nothing, and will accomplish a sound and necessary result.

Respectfully submitted,

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APPENDIX.

Section 9303, Revised Codes of Montana, 1921:

9303. Appointment of receivers upon dissolution of corporations. Upon the dissolution of any corporation, the district court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members.